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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

VENTON SMITH,

Plaintiff,

V.

CAPITAL ONE BANK, N.A., et al.,

Defendants.

Case No. 3:23-CV-02804

Hon. Araceli Martínez-Olguín

**CAPITAL ONE AND AMAZON'S REPLY
MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

Date: February 29, 2024

Time: 2:00 p.m.

Ctrm: 10 - 19th Floor

REPLY MEMORANDUM OF LAW

Capital One, N.A. (“Capital One”), successor-by-merger to Defendant Capital One Bank (USA), N.A., and Amazon.com, Inc. and Amazon Web Services (together, “Amazon”), by counsel, submit this reply memorandum of law in support of their motion to dismiss.

In his opposition to Capital One’s and Amazon’s motion to dismiss (Dkt. 57, “Opp.”), Plaintiff does not dispute any of the following facts: (1) The MDL Court approved a class-action settlement (the “Settlement Agreement”) and entered judgment (it did, *see* Ex. E to the Declaration of Stewart Haskins, MDL Dkt. 2263); (2) Plaintiff, as alleged in his Complaint, is a member of the settlement class who did not opt out (he is, *see* Ex. F to the Declaration of Stewart Haskins, MDL Dkt. 2263-1); (3) the Settlement Agreement releases claims against Capital One and Amazon arising out of the Data Breach (it does, *see* Ex. C to the Declaration of Stewart Haskins, MDL Dkt. 2219-1, §§ 2.34, 14); and (4) Plaintiff’s claims in this action against Capital One and Amazon all arise out of the Data Breach (they do, *see* Compl. ¶¶ 111, 128, 138, 146, 155, 159, 172, 192, 227). Nor does Plaintiff dispute that these facts are subject to judicial notice. *See* Dkt. 18 at 8 n.1. That is the end of the matter; no further inquiry is necessary. Capital One’s and Amazon’s motion to dismiss should be granted. *See Silber v. Mabon*, 18 F.3d 1449, 1451 (9th Cir. 1994) (enforcing settlement agreement against a plaintiff who failed to opt out); *see also Montgomery v. Capital One Bank (U.S.A.), N.A.*, No. 1:22-cv-1462 (AJT/JFA), Dkt. 17 (dismissing a Data Breach claim against Capital One filed by an individual who did not opt out of the Settlement Agreement) (attached as Exhibit G to the Declaration of Stewart Haskins).

Instead of engaging with these dispositive facts, Plaintiff advances the frivolous and irrelevant argument that he, along with two million individuals were “excluded” from the Settlement Agreement. As “evidence,” he merely compares the language in Capital One’s original press release stating that “approximately 100 million individuals” were potentially impacted with the language of the Settlement Agreement—with the benefit of a full investigation of the breach—stating that “approximately 98 million” individuals were potentially impacted. In any event, the MDL Court did not tie its Settlement Class definition to a press release and defined it to include all “individuals whose information was compromised by the Data Breach.” Ex. E to the

1 Declaration of Stewart Haskins, Final Approval Order, MDL Dkt. 2263 at 7. There is no question
 2 that Plaintiff is a member of the Settlement Class and bound by the Settlement Agreement. The
 3 MDL Court included the list of the 1,300 opt-outs in its Final Approval Order. Dkt. 18-2 at 148-
 4 174. Plaintiff's name does not appear on this list. Dkt. 18-2 at 148-174. The proof in this case will
 5 show that on May 5, 2022, notice of the Settlement Agreement was sent to Plaintiff via email at
 6 ventonsmith@gmail.com—the same email address used by Plaintiff in various exhibits (Exs. A
 7 through F) attached to his Complaint. *See* Dkt. 1 at 44-51.

8 Plaintiff argues that he did not receive actual notice of the Settlement Agreement and
 9 therefore had no chance to opt out of it. There is reason to doubt Plaintiff's representation. But
 10 even if true, it is irrelevant because "neither Rule 23 nor the Due Process Clause requires actual
 11 notice to each individual class member." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128
 12 (9th Cir. 2017). Rather, the notice provided need only be "reasonably certain to inform the absent
 13 members of the plaintiff class." *Silber*, 18 F.3d at 1454 (citation omitted); *see also Mullane v.*
 14 *Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (notice must be "reasonably calculated,
 15 under all the circumstances, to apprise interested parties of the pendency of the action and afford
 16 them an opportunity to present their objections"). The MDL Court found that the notice plan
 17 satisfied Rule 23 and due process, *see* Ex. D to the Declaration of Stewart Haskins, MDL Dkt.
 18 2220 ¶ 9, and Plaintiff has provided no basis for this Court to disturb those findings. That Plaintiff
 19 (as he represents) did not receive actual notice and thus (as he represents) was "fortuitously unable
 20 to exercise his right to opt out in a timely fashion ... does not mean that the best practicable notice
 21 under the circumstances was not given to absent class members." *See Silber*, 18 F.3d at 1454. And
 22 while Plaintiff contends that the MDL Court settlement agreement does not bar his claims because
 23 he discovered his purported injury in 2022, Opp. at 15, that is, in fact, exactly what the Settlement
 24 Agreement does for anyone who, like Plaintiff, is bound by its terms, including the release of such
 25 claims. *See* Ex. C to the Declaration of Stewart Haskins, MDL Dkt. 2219-1, §§ 2.34, 14 (defining
 26 "Released Claim" to include "any and all claims ... in law or in equity, for any relief whatsoever
 27 ... that in any way concern, arise out of, or relate to the Data Breach").

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1 Plaintiff alternatively makes the unsupported argument that even if his other claims are
 2 barred, his FCRA claims survive. This is incorrect. Because the FCRA claims arise out of the Data
 3 Breach, they are also barred by the plain language of the release. Members of the Settlement Class
 4 released “any and all claims . . . for any relief whatsoever . . . whether a known or unknown claim
 5 . . . that in any way concern, arise out of, or relate to the Data Breach, the facts alleged in the
 6 Actions, or any theories of recover that were, or could have been, raised at any point in the
 7 Actions.” Mot. at 5. Plaintiff does not dispute that all of his claims against Capital One and Amazon
 8 relate to the Data Breach. Compl. ¶¶ 19-44, 103-195 (detailing claims based on the Data Breach).
 9 All Plaintiff’s claims against Capital One and Amazon—including his FCRA claims—are thus
 10 barred by res judicata.

11 Finally, if this case is not dismissed in accordance with the Settlement Agreement, it should
 12 be transferred to the MDL Court, which retained jurisdiction over “all matters” relating to the
 13 MDL litigation, including “the administration, interpretation, scope, effectuation or enforcement
 14 of the Settlement Agreement.” Ex. E to the Declaration of Stewart Haskins, Final Approval Order,
 15 MDL Dkt. 2263, § 12. Plaintiff does not dispute the meaning of this provision but argues that the
 16 *Aguirre v. Capital One*, No. 8:23-cv-00128 (C.D. Cal) matter demonstrates that transfer is
 17 inappropriate. *Aguirre* involved plaintiffs who opted-out of the Settlement Agreement and thus
 18 were not bound by its terms. While dismissal is the proper remedy, the Court should transfer the
 19 case to the Eastern District of Virginia if it determines that any questions over the settlement, or
 20 Plaintiff’s membership in the settlement class, require resolution before dismissal. See, e.g., *Zone*
 21 *Sports Ctr., Inc. LLC v. Red Head, Inc.*, No. 110-cv-01833, 2011 WL 13152741, at *2 (E.D. Cal.
 22 Feb. 7, 2011) (transferring a collateral attack on a settlement pursuant to the settlement agreement’s
 23 selected forum); *Zacklift Int’l, Inc. v. Koomia*, No. CV-08-3025-FVS, 2008 WL 4546967, at *1
 24 (E.D. Wash. Oct. 6, 2008) (same); *Wescott v. Crowe*, No. CV-20-01383-PHX-SPL, 2020 WL
 25 5535760, at *2 (D. Ariz. Sept. 15, 2020) (same).

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1 For the foregoing reasons, Capital One and Amazon should be dismissed with prejudice.
2 In the alternative, the case should be transferred to the Eastern District of Virginia.

3 Dated: February 9, 2024

Respectfully submitted,

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26 *Attorneys for Amazon.com, Inc. and Amazon Web
27 Services, Inc.*

28 **ATTESTATION**

29 I, Matthew J. Blaschke, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the
30 concurrence to the filing of this document has been obtained from each signatory hereto.

31 Dated: February 9, 2024

32 By: /s/ Matthew J. Blaschke
33 Matthew J. Blaschke